

**2008 STATE BAR OF CALIFORNIA ENVIRONMENT SECTION
NEGOTIATION COMPETITION
FINAL ROUND FACT PATTERN (BOTH TEAMS)**

INSTRUCTIONS: The final negotiation session is based on the same fact pattern as the earlier rounds. The confidential instructions from the earlier rounds, however, do not apply in this round. Reliance on the confidential instructions for previous rounds will not help and could harm your case. Please review the new information for both teams (below) and the new confidential instructions. Formulate a negotiation strategy. The final round negotiation will be 75 minutes. The final negotiation session is between the Society for Clean Air Now (SCAN) and Biomassive. Teams will be assigned regardless of which side they previously represented.

ADDITIONAL FACTS:

Assume that all other litigation has been dropped and has no effect on this round.

SCAN, a state-wide organization with members throughout the state, sees Biomassive as one of the biggest contributors to air pollution and global warming in the state, with its energy plants and massive truck fleets roaming California's highways and back roads. SCAN's mission is to make measurable changes to industry practices that benefit the overall environment, with a focus on improving air quality statewide. SCAN has informed Biomassive that it intends to bring a suit against Biomassive for its Clean Air Act violations. SCAN has sent a 60-day notice to Biomassive; 60 days have passed, and SCAN is ready to sue Biomassive in the federal district court. (42 U.S.C. § 7604.) Assume that SCAN has citizen group standing.

SCAN and Biomassive are not concerned about arguing about any large penalty payment; rather the session will focus on:

1. Facility upgrades to improve air quality.
2. Injunctive relief governing facility operations, including trucking.
3. Use of Biomassive's energy plants to dispose of forest byproducts, and how those byproducts will be collected and transported.

In addition to its Ripon facility, Biomassive has two other smaller facilities located at Woodland and Wheatland. The other facilities are aged, and have not received any recent upgrades. The Woodland facility is near residential housing. The Wheatland facility is remote. The Wheatland facility has had a history of permit violations, particularly for excess NO_x emissions.

Constellation Industrial designs and installs custom, cutting-edge emissions control equipment. Constellation is the company that performed the \$20 million in upgrades at Biomassive's Ripon facility. In order to get the work, Constellation is willing to perform two complete emissions upgrades at Biomassive's smaller Woodland and Wheatland facilities for \$17 million each. In the alternative, Constellation can sell packages of partial treatment options, although these

partial treatment packages will cost more individually than the complete package: Constellation sells individual packages as follows:

- o gas burners as part of a CO-Gone package for \$7 million (carbon monoxide (CO), a by-product of burning wood, is a potentially toxic pollutant);
- o a Soot-Out package is \$9 million (particulate matter, or PM, takes the form of sooty emissions; PM causes increased incidences of asthma and is a potential carcinogen); and
- o a NOx-Off package is \$4 million (nitrogen oxides form when fuel is burned at high temperatures, as in a combustion process, and is one of the main ingredients involved in the formation of ground-level ozone, which can trigger serious respiratory problems; NOx also contributes to global warming).

Constellation is willing to take payments over time.

In addition, Boilermaster, the nation's largest boiler manufacturer, has offered Biomassive two boiler systems packages. These packages run \$8 million for an only-wood-fired boiler and \$10 million for a natural gas co-fired wood boiler package. The point of replacing a boiler is to burn less wood and reduce emissions overall.

Boilermaster will also accept payments over time.

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CONFIDENTIAL INSTRUCTIONS FOR SCAN (you represent SCAN)

SCAN can get some good press if it reaches a strong settlement with Biomassive, one that benefits SCAN's membership and all Californians. SCAN does not want a penalty or "blood money" from Biomassive. It wants an agreement that will measurably benefit air quality in this state. This opens the door for creative ideas from both sides to benefit the environment.

1. Facility upgrades. Biomassive has already spent \$20 million to upgrade its Ripon facility. SCAN wants more. SCAN would be quite pleased if Biomassive undertook \$34 million in additional facility upgrades at its two other plants, but the parties are free to bargain whether that will occur, whether more money will be allocated at a particular facility, whether the expenditures will be made over time, and the time frame.

SCAN anticipates, and is somewhat annoyed with, Biomassive's proposal to include a new boiler upgrade proposal in negotiations. Biomassive should have replaced its Wheatland boiler years ago as part of its operations plan. Settlement money should be spent on cutting-edge pollution control devices. But, on the other hand, the \$10 million boiler package is actually attractive because it includes natural gas burners. While these burners are not back-end pollution devices, they allow the operator to "co-fire" the gas burners to dry out wet wood in winter months, in theory reducing overall CO emissions by drying the fuel and reducing wood fuel use. Because the \$10 million boiler package includes natural gas burners, the need to add the CO-Gone package is obviated. SCAN figures it will consider the boiler package as part of a global deal, but only after Biomassive commits to immediate upgrades at the Woodland facility.

SCAN thinks the local regulators did a poor job with the Woodland permit - even though there have been no exceedences there, the existing permit limits for particulate are too lax and do not adequately protect sensitive groups. The Woodland facility has to come first, because of its proximity to people. SCAN is particularly interested in seeing Biomassive install the \$9 million Soot-Out package at Woodland, to reduce emissions of the finest particles emitted from the stack at that facility. SCAN wants settlement dollars spent at Woodland right away.

2. Facility operation. SCAN wants improvements in Biomassive's operations, particularly with its truck fleet and hours of operation.

A. Truck Fleet Upgrade. SCAN knows that Biomassive's trucks are old and run dirty. SCAN wants replacement of as much of the truck fleet as possible as quickly as possible. This fleet of approximately 200 trucks needs to be replaced with clean-burning diesel units now. SCAN will agree to replacement over time, but with a time table. SCAN wants Biomassive to sell all the old units for scrap, not re-sell them to another operator, which would entirely defeat the purpose of the upgrade. You should push for the most aggressive replacement schedule possible. Trucks can be replaced at a cost of \$120,000 each. SCAN obviously would like to see all of Biomassive's fleet replaced immediately, but recognizes that the cost of doing that might be prohibitive. You should negotiate for the most rapid truck replacement schedule possible.

B. Hours of Operation. SCAN also wants Biomassive to consider operating its facilities in a manner to reduce emissions as much as possible. SCAN knows that this conflicts with Biomassive's basic business goal of maximizing profits by firing the boilers at maximum load to sell energy when prices are highest, but SCAN would like to test Biomassive's willingness to put the quality of the environment ahead of its bottom line. As a simplistic measurement, SCAN wants Biomassive to cut back its hours of operation, and shut down the co-generation plants between 6 p.m. and 6 a.m. (This would have the added benefit of preventing any foul play by Biomassive when darkness masks the plume from its stacks.) If limits on operations are a non-starter, then SCAN wants some kind of surveillance system installed to watch over Biomassive's operations at night.

3. Forest byproducts. SCAN wants Biomassive to help improve air quality in the state by collecting and burning forest residues like logging slash in its co-generation plants. These forest products are a major fire hazard when left in place, such as the Lake Tahoe-area Angora fire of 2007. The forest residues are a source of criteria pollutants if they are open-burned and they contribute to forest fires and other environmental problems when left in place to decompose. By using forest residues in its facilities, Biomassive could reduce the fire threat, as well as the potential pollution emissions from these residues, by burning them in a controlled environment, with emissions control equipment.

SCAN has a proposal to use its connections with the U.S. Forest Service to ensure access for Biomassive to remove forest residues. And SCAN has contacted logging operators who are willing – and eager – to pay trucking costs for this service, so the only cost to Biomassive is the use of its vehicles for transportation. SCAN intends to pitch this proposal as an opportunity for Biomassive to obtain favorable public and government reprieve. SCAN would like to see Biomassive commit to this activity as long as possible, with an initial commitment of two to five years. But if Biomassive makes measurable commitments in other areas, like facility upgrades, SCAN is willing to reduce the commitment to this activity.

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CONFIDENTIAL INSTRUCTIONS FOR BIOMASSIVE (you represent Biomassive)

SCAN is just another annoyance, interfering with Biomassive's day-to-day business plans. Nevertheless, Biomassive is willing to consider negotiating with SCAN because it knows that it can get some positive press coverage with a pro-environment settlement. An added bonus is that SCAN apparently does not want a penalty or other liability payment, SCAN wants only improvements to air quality and the environment. These are things that Biomassive is willing to pay for. This opens the door for creative ideas from both sides to benefit the environment.

1. Facility upgrades. Biomassive has already spent \$20 million to upgrade its Ripon facility. The issue here is how much more is Biomassive willing to pay for upgrades. Biomassive officials know they will have to pay something, and that it will be significant, but they simply do not have the cash available to pump unspecified millions more into the company. Cheap labor abroad has made it difficult to compete with foreign competitors and increased fuel prices have tripled transportation costs in the past year. The company has been hit hard. At most, the company can afford to spend \$5 million per year over the next five years, for a total of \$25 million. Anything more might bankrupt the company, or drive it out of California. The state of Texas has been wooing Biomassive to begin operations there, offering significant subsidies and other incentives. And the environmental laws in Texas appear much less restrictive. Moreover, just because it could spend up to \$25 million over five years, does not mean that it wants to spend that much. Biomassive should negotiate to spend as little as possible.

Of the two remaining facilities, Biomassive prefers for business reasons to concentrate its upgrades at the Wheatland site, the older of the two. It hopes by doing so it can avoid having any violations at that site. The Woodland site is not as old and has not had a history of violations. In particular, it wants to replace the Wheatland facility's existing boiler with a \$10 million upgrade to Boilermaster's state-of-the-art natural gas co-fired wood boiler package. Because the \$10 million boiler package includes natural gas burners, the need to add the CO-Gone package is obviated. Biomassive really wants to include this new boiler in the settlement package because it knows it must replace the existing boiler, and it must do it soon. Biomassive has been chasing air and tube leaks in Wheatland's old boiler system for several years. These leaks decrease overall combustion efficiency and contribute to pollution control problems. The result is episodic permit exceedences, particularly in winter; and the Wheatland facility has to burn more fuel to produce the energy it needs. A new boiler would allow for better control of air-fuel ratios and temperatures within the boiler. It would also allow Biomassive to co-fire (burn) natural gas as a supplement to wood in winter when wood is really wet. The Wheatland facility could produce the same amount of energy with less fuel and hence less pollution. The new boiler package is definitely a priority. As for Woodland, it plans to make concessions there only if necessary, to close the deal.

Biomassive also wants to install the NO_x-Off package at Wheatland, to reduce the number of NO_x violations, and because it is much less expensive than some of the other options.

Biomassive plans to remind SCAN that its Woodland and Wheatland permits were issued by regulators who took human health into account. In Biomassive's view, it has a legally shielded right to emit up to maximum allowed by its permit limits. Woodland's permit limits are good enough to protect the inhabitants nearby. After all, that facility is newer and has no history of permit exceedences. The Wheatland facility should be a priority. And if SCAN is really interested in making positive changes for "the environment," it should agree that putting an end to permit violations at Wheatland – once and for all – is a priority.

2. Facility operation.

A. Truck Fleet Upgrade. Biomassive knows that its large truck fleet is old and in need of upgrade. To maximize fuel economy, it already had plans in the works to replace up to eighty percent of its fleet of over 200 trucks over 5 years, 40 trucks per year. (Trucks are expensive, costing \$120,000 to replace with modern equipment.) It does not believe that SCAN knows that it was planning to do this already and hence this large-dollar item that is already in Biomassive's corporate budget should be of great utility in negotiations. Biomassive would consider replacing the rest of its fleet over a more extended period of time, perhaps twenty years. Biomassive's existing budget for the eighty percent fleet upgrade includes its plan to sell its old trucks to help finance the upgrade.

B. Hours of Operation. Biomassive currently operates its co-generation facilities 24-7. Biomassive knows that one way to reduce overall emissions would be to cut back the number of hours of operation. Reducing hours of operation would also reduce shift costs. On the other hand, during summer months, Biomassive wants to operate as much as possible to sell energy to the power company. Biomassive will not agree to cut back operations during July-September. Perhaps during other times of year the company will agree to limit its hours of operation. The company will not agree to more than a 50% reduction of operating hours at any time, or it will not have enough energy to operate its own agricultural processing operations, or enough heat which is needed to sterilize its packaging products.

The harvest season at Biomassive is in July and August, when both steam and electric in-plant demand is at the highest. The plant operates 24-7 with maximum staff to process and pack the summer harvest. This period coincides with the peak demand from the power companies also. Curtailing operation during harvest would be financially lethal to the plant, as most of the annual profits are due to revenues accrued during the summer and fall months, and this cash flow keeps the company going during the remainder of the year. The plant could easily go to reduced shifts in the winter season because plant demand is down and during the evening hours, the export power demand is low due to the abundance of hydroelectric power during the winter months.

3. Forest byproducts. Biomassive knows that SCAN is keenly interested in projects involving cleaning out forest residue to reduce forest fires, and minimizing open burning of that residue. The fires cause great environmental damage and pollutant emissions. Biomassive can burn the forest waste in its controlled facilities and greatly reduce the amount of emissions, not to mention the fire threat.

But Biomassive really wants no part in such projects. The administrative hassle and unknown costs of locating and transporting these residues to Biomassive's plants is undesirable. A lot of these residues exist on U.S. Forest Service property. Biomassive has no connection with the U.S. Forest Service and no idea what is going to be involved with getting onto and working on U.S. Forest Service properties.

Moreover, forest byproducts are completely disconnected from Biomassive's agricultural operations. Biomassive is willing to continue to burn byproducts of farming operations, including tree limbs and rice hulls, etc., but does not want to send equipment hundreds of miles into the Sierra Nevadas to collect someone else's waste. It believes this idea is counterproductive because all the trucking miles that would be used to collect and deliver the forest byproducts to Biomassive's co-generation facilities would be harmful to the environment.

If this proposal could be implemented at little or not cost and hassle, however, Biomassive is willing to consider it. For example, it could commit some of its trucks/equipment in the off-season months of September through May, if someone else pays the trucking costs. Biomassive would want to see a time-frame attached to this proposal – an initial commitment of a year, maybe – then no further commitment to continue this project unless it benefits Biomassive's balance sheet (it might, after all, if someone else is paying for the trucking, this is free fuel). At a maximum, Biomassive will commit to three years, so long as there are no hidden costs in the deal.